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IN THE

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION of the
WESTSIDE COMMUNITY SCHOOLS (Dist. 66), et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

On Writ Of Certiorari To
The United States Court of Appeals
For The Eighth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VIRGINIA, WEST VIRGINIA AND WISCONSIN, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE*

This is a First Amendment case. It presents important issues concerning freedom of speech and equal treatment that impact on the liberties of all Americans. The American tradition of nondiscriminatory free and open discourse in public places (with American public schools playing a central role as an important part

*Counsel of Record to the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

of the "marketplace of ideas") has contributed greatly to the success of our democracy. The Petitioners would drastically restrict this freedom by denying equal access to public school fora to a particular class of citizens — students who express religious beliefs. Petitioners' First Amendment "theory" would permit school authorities to circumscribe and discriminate against public high school students on the basis of the religious content of their speech. Such is not only inconsistent with the American tradition and this Court's First Amendment cases, but it poses a grave threat to freedom of speech as we now know it in this country.

The Rutherford Institute believes that this case, with issues concerning the right of student religious groups to nondiscriminatory access to public school fora on the same basis as other student groups, is of critical importance to our Constitutional jurisprudence and the growth and progress of the Nation. We believe this case presents the Court with an opportunity to clarify the law of equal access and to make clear that religious students do not shed their Constitutional rights at the schoolhouse door.

Amici Curiae, The Rutherford Institute and its affiliated state chapters, have as two of their purposes preserving freedom of speech in the public arena and defending the right of religious persons and organizations to abide by their beliefs free from state intrusion. These values are deeply rooted in America's common law and Constitutional tradition.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Nebraska, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin and its national office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to the protection and safeguarding of religious freedom. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the

expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts as set forth in Respondents' brief filed with this Court.

SUMMARY OF ARGUMENT

The Equal Access Act does not violate the Establishment Clause of the First Amendment. 20 U.S.C. §§4071-74 (1984). The Act complies with the tripartite test formulated by the Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). First, the Act has the secular legislative purpose of avoiding content-based discrimination against voluntary student groups which wish to meet for free speech purposes on equal terms as other student groups. Second, the primary effect of the Equal Access Act is one of absolute neutrality and, therefore, neither advances nor inhibits religion. Since the Act protects *all* religious, political and philosophical points of view equally against censorship and discrimination, it does not result in an endorsement, or even an apparent endorsement, of any religion or non-religion. Finally, the Act does not require any government entanglement with religion.

Petitioners' policy of excluding and censoring the private religious speech of students violates the Establishment Clause because it clearly conveys a message of state disapproval of religion. Therefore, its primary effect is to inhibit religion in violation of the Establishment Clause.

By their policy and practice of providing facilities for use by student organizations, Petitioners have created a limited public forum for use by student groups. Therefore, in order to justify their content-based exclusion of religious student groups from the school's limited public forum, Petitioners were required to show that their policy is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Since Petitioners failed to make the necessary showing, their policy violates the Free Speech and Free Exercise Clauses of the First Amendment and is

inconsistent with this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

ARGUMENT

I. THE EQUAL ACCESS ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court formulated a three part test to determine whether a statute or practice which touches upon religion is valid under the Establishment Clause. First, the statute or practice must have a secular purpose; second, its primary or principal effect must neither advance nor inhibit religion; and third, it must not foster an excessive government entanglement with religion. *Id.* at 612-613. In the instant case, the Eighth Circuit correctly concluded that Congress neither violated the Constitution nor misread this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), when it enacted the Equal Access Act to ensure that students in public secondary schools would be protected against discrimination and censorship under the decision in *Widmar*.[1]

A. The Equal Access Act has a Secular Legislative Purpose.

In *Widmar* this Court held that the first prong of the *Lemon* test was "clearly met" by a nondiscriminatory, equal access policy at a public university. 454 U.S. at 271. The Court noted that "an important index of secular effect" is that facilities are open to nonreligious as well as religious speakers. *Id.* at 274. Unlike a policy that permits religious groups, but not others, to use school facilities, an equal access policy serves the secular purpose of

[1] *Mergens v. Board of Education of Westside Community Schools (Dist. 66)*, 867 F.2d 1076, 1079 (8th Cir. 1989). During Senate debate, Senator Levin explained the connection between *Widmar* and the Equal Access Act as follows:

> I am persuaded that the pending amendment is constitutional in light of the Supreme Court's decision in Widmar against Vincent. This amendment merely extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools.

130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin).

ensuring that public fora are open to *all* student organizations and are, therefore, kept free of censorship and content-based discrimination.

The purpose of the Equal Access Act is to ensure that open fora in public secondary schools are truly open and free of discrimination.[2] Congress was particularly concerned that legislation was needed "to protect students who are being discriminated against in secondary schools today based on the religious content of their speech."[3] Clearly, the secular goal of Congress to protect the Constitutional rights of students attending public secondary schools is not violative of the Establishment Clause. In fact, one commentator recently compared the Equal Access Act with statutes banning employment discrimination on the basis of religion and concluded that both serve a valid purpose under the Establishment Clause:

> Consider the statutes banning employment discrimination on the basis of religion. A principal purpose of such statutes is to assist religious minorities. Their purpose also can be characterized as restoring religious neutrality to the private labor market. There is no point to metaphysical debate over the religious or secular nature of such a purpose. Whatever we call it, it is a purpose consistent with the establishment clause. Barring discrimination against religious speech is equally consistent with the establishment clause.

[2] The Senate Judiciary Committee explained the purpose of the Equal Access Act as follows:

> The purpose of this legislation is to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day when the school permits extracurricular activities.

S. Rep. No. 357, 98th Cong., 2d Sess. 3 (1984).

[3] 130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin). *See also* S. Rep. No. 357, 98th Cong., 2d Sess. 10-11 (1984) (Equal Access Act was designed to rectify a perception of state hostility toward student-initiated religious speech).

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 21-22 (1986).

B. The Primary or Principal Effect of the Equal Access Act Neither Advances nor Inhibits Religion.

"The line between the religious speech protected by the free speech and free exercise clauses and the religious speech forbidden by the establishment clause is the line between private speech and government speech." Laycock, *supra*, at 30. The Equal Access Act does not result in state advancement of religion. Rather, it is strictly neutral legislation that has the primary effect of protecting private speech of all points of view, whether religious, non-religious, or secular, from censorship and content-based discrimination.

This Court considered the identical issue in *Widmar* and concluded that "we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 454 U.S. at 273. The Equal Access Act does not require public secondary schools to sponsor or endorse religious sects or practices. Rather, it merely provides that public officials must refrain from censoring voluntary, student-initiated speech on the basis of its religious, political, philosophical, or other content. Indeed, if allowed equal access to the Westside High School forum, Respondents' Bible Study Club would be one of approximately thirty student clubs meeting at the school. *Mergens*, 867 F.2d at 1077. These other student clubs include a Chess Club, Interact and Zonta, male and female service clubs peripherally connected to Rotary International, and Subsurfers, a club for students and community members interested in scuba diving. *Id.* at 1078. Therefore, "at least in the absence of empirical evidence that religious groups will dominate" the Westside High School open forum, the primary effect of the Equal Access Act is not the advancement of religion. *Widmar*, 454 U.S. at 275.

Recently, in *Garnett v. Renton School District No. 403*, 865 F.2d 1121 (9th Cir. 1989), the Ninth Circuit attempted to distinguish *Widmar* from equal access in public secondary school fora

and concluded that "[t]he religious activity proposed in this case, which would take place at a time closely associated with a highly structured school day, would be far more likely to appear to enjoy school sponsorship than a group on a college campus." *Id.* at 1125. In reaching this conclusion, the *Garnett* panel placed great weight on the perceived "impressionability" of high school students, compulsory attendance laws "that make students a captive audience," and "the role of public schools in inculcating democratic ideals." *Id.* To the contrary, however, each of these factors point the other way and support the conclusion that the Equal Access Act has a strictly neutral impact on religion.

In the modern age, youth are continuously confronted with a myriad of choices not available to past generations. These choices range from whether to participate in an abortion to whether one should file a lawsuit against his or her parents, teachers or school. These experiences, which infuse the culture, necessarily force maturity upon young people to the extent that some experts now argue that the "dividing line between childhood and adulthood is being unmistakably eroded." N. Postman, *The Disappearance of Childhood* 75 (1982); *see also* D. Elkind, *The Hurried Child* (1981). Indeed, this Court has recognized a pregnant teenager must be allowed to show that she is "mature enough" to make a decision to have an abortion without the necessity of either parental consent or judicial control. *Bellotti v. Baird*, 443 U.S. 622, 643-44, 651 (1979). *See also* J. Nowak, R. Rotunda and J. Young, *Constitutional Law* 705 (3d ed. 1986).

Moreover, both the evidence in this case,[4] as well as respected academic studies, support the conclusion that high school students have the cognitive ability to understand that, in a free and pluralistic society such as ours, toleration of speech or ideas in an open forum does not imply endorsement or sponsorship. *See* D. Moshman, *Children, Education, and the First Amend-*

[4] At trial, David Moshman, Ph.D., an expert in the development of cognitive reasoning and intellectual development of children, testified that by the age of 12 children have the ability to understand the difference between school sponsored or endorsed activities and voluntary student-initiated and directed activities. (Tr. 560: 6-25, 557: 25 - 559:1). Likewise, the Eighth Circuit held that there is no material difference between high school and college students for these purposes. *Mergens*, 867 F.2d at 1080 n.2.

ment: A Psycholegal Analysis 114-19 (1989).[5] Moreover, in connection with its consideration of the Equal Access Act, the Senate Judiciary Committee examined the evidence and specifically concluded "that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism." S. Rep.No. 357, 98th Cong., 2d Sess. 8 (1984). This view is supported by scientific research. For example, one expert recently surveyed the empirical research on deductive reasoning, applied it specifically to the issue of equal access in public secondary schools, and stated the following conclusion:

> These considerations support the Supreme Court's conclusion that most college students will understand the voluntary nature of student groups and will not perceive an establishment of religion. The evidence reviewed . . . suggests that high school students, and probably junior high students as well, cannot be sharply distinguished from college students. There is no reason to think that secondary students will naively assume that all groups meeting in a school are thereby endorsed by the school or that they are encouraged to join all such groups. On the contrary, it seems likely that a prominent sign associated with notices of student activities would be sufficient for adolescents to grasp the voluntary nature of the activities.

Moshman, *supra*, at 117.

Reduced to its essence, the Ninth Circuit's analysis in *Garnett*, amounts to an unsubstantiated fear that students will mistakenly conclude that the government endorses everything it does not censor. This position fails to accord due respect to the Constitutional rights of religious students who seek equal access to open fora in public secondary schools. As former Chief Justice Burger stated in his dissenting opinion in *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 553 (1986) (Burger, C.J., dissenting), if the Free Speech and Free Exercise Clauses "are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion."

[5] *See also* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-09 (1983) (collecting research in the field of adolescent psychology suggesting "that high school students are generally independent and capable of critical inquiry").

Even assuming *arguendo* that compliance with the Equal Access Act could give rise to a mistaken perception of endorsement of religion, any regulation or policy adopted by the school to serve its asserted compelling interest under the Establishment Clause must be narrowly drawn to achieve that interest. As this Court held in *Widmar*:

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

454 U.S. at 269-70; *see also Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980). In the instant case, Petitioners made no effort to narrowly tailor their policy to achieve their interest without burdening Respondents' rights under the Free Speech and Free Exercise Clauses. For example, Petitioners certainly could have eliminated any mistaken perception of endorsement by disclaimer and by explaining the equal access policy to students through announcements and posted notices. Evidence clearly indicates that public high school students would have been able to understand these explanations, and, therefore, there was no need to adopt "the more restrictive alternative of abridging freedom of speech, freedom of association, and the free exercise of religion." Moshman, *supra*, at 118.

Compulsory education laws do not affect these conclusions. Since Respondents' Bible Study Club is both voluntary and student-initiated, there is no possibility of a "captive audience" for Respondents' religious message. To the contrary, compulsory education laws, which require students to attend school, give rise to a special need to protect religious students such as Respondents

from being treated like outsiders whose religious beliefs must be checked at the public schoolhouse door. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511 (1969).

Finally, the Equal Access Act is perfectly consistent with the role of the public schools in inculcating democratic ideals. Our society's commitment to freedom of religion, freedom of speech, and pluralism is modeled by public schools when they comply with the Equal Access Act.[6] In fact, the schools serve as poor role models for the ideals of freedom and tolerance when they discriminate against and deny equal access to religious student groups. "Whatever the risk that some students will perceive an open forum as an endorsement of all groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows students to talk about anything except religion." Laycock, *supra*, at 20.

C. The Equal Access Act does not Foster an Excessive Entanglement Between Government and Religion.

In *Garnett*, the Ninth Circuit interpreted the entanglement prong of the *Lemon* test in an inflexible manner that threatens the Constitutional rights of religious people to meaningful participation in society. Expressing concern regarding the need for schools to monitor student activities in order to maintain safety and discipline, *Garnett* held: "If the government must engage in continuing supervision of religious activity, church and state become excessively entangled." 865 F.2d at 1126. Taken at face value, this reading of the Establishment Clause would render unconstitutional numerous free speech expressions, including public demonstrations and picketing activities by religious persons if police supervision were provided by the state in order to preserve order and ensure public safety.

[6] *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (the fundamental values essential to a democratic society "must, of course, include tolerance of divergent political and religious views").

If a public school requires a monitor to be present at student meetings to preserve order and decorum, it can avoid entanglement simply by instructing the monitor to remain strictly neutral and not participate in the meeting. If the school is concerned that the monitor might, over time, become closely identified with the student group and its religious activities, then it should assign different monitors from time to time; or, for that matter, it could assign monitors who do not identify with and/or are indifferent to the religious beliefs of the group.

Section 4071(c) of the Equal Access Act is clearly designed to ensure that compliance with the Act will not result in excessive entanglement. It provides that a school shall be deemed to offer a fair opportunity to student groups seeking access to the open forum so long as the school uniformly provides that:

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

20 U.S.C. 4071(c). Clearly, compliance with the Equal Access Act presents no risk of excessive entanglement between government and religion. As the Eighth Circuit concluded in the case before this Court, an equal access policy is less likely to entangle the school with religion than is a policy of religious censorship. *Mergens*, 867 F.2d at 1079. While an equal access policy is satisfied when the school adopts a strictly neutral, nondiscriminatory posture as to *all* points of view, a censorship policy requires the school to determine which groups, which words, and which activities are "religious" and therefore forbidden. The policy of religious censorship also results in "a continuing need to monitor group meet-

ings to ensure compliance with the rule." *Widmar*, 454 U.S. at 272 n. 11. Thus, censorship in the public school setting leads to entanglement.[7]

Finally, the entanglement requirement is designed primarily to protect religion against state interference. It was never intended to limit the free speech rights of religious citizens. Therefore, the proper application of the entanglement test is against state interference with religion; it should not be interpreted to require public officials to exclude private religious speakers from public fora.

II. PETITIONERS' POLICY OF CENSORING PRIVATE RELIGIOUS SPEECH OF STUDENTS VIOLATES THE ESTABLISHMENT CLAUSE.

Under the second prong of the *Lemon* test, the Establishment Clause is violated by a public school policy that has the primary or principal effect of inhibiting religion. 403 U.S. at 612. *See also County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086, 3102-03 (1989). Justice O'Connor has stated that the Establishment Clause is violated if a "reasonable observer" would view the challenged policy as conveying a message of governmental disapproval of religion. *See Allegheny*, 109 S. Ct. at 3118, 3121 (O'Connor, J., concurring).[8]

Petitioners' discriminatory policy of excluding Respondents and, thus, censoring the private, religious speech of students violates the Establishment Clause because it sends a message to religious students that they are outsiders and not full members of the high school community; it also sends a message to other student

[7] *See Walz v. Tax Commission*, 397 U.S. 664, 675 (1970), in which this Court noted: "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."

[8] Justice William O. Douglas expressed the same concern over inhibition of religion in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952):

> That would be preferring those who believe in no religion over those who do believe .... But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

groups that they are preferred and, thus, are insiders and favored members of the high school community. In this respect, as Professor Tribe notes: "A message of *exclusion* . . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups." L. Tribe, *American Constitutional Law* 1175 (2d Ed. 1988) (emphasis in original). This is precisely the evil the eradication of which this Court has found to lie at the core of the Establishment Clause. *Allegheny*, 109 S. Ct. at 3102.

A reasonable observer would conclude that Petitioners' policy denying equal access to Respondents' Bible Study Club conveyed a clear message of disapproval by the government of religion.[9] For example, in the present case before this Court, approximately thirty student groups have been permitted to meet at Westside High School including a Chess club, a scuba diving club, and two service clubs similar to Rotary International. *Mergens*, 867 F.2d at 1077-78. Significantly, until Respondents attempted to form their Bible Study Club in early 1985, "no club had ever been denied access to the school." *Id.* at 1077. As the Senate Judiciary Committee concluded more generally when it heard testimony on the Equal Access Act, "a prohibition on student-initiated, extracurricular, religious speech when other student-initiated extracurricular speech is permitted creates a *reasonable perception* of state hostility toward religious speech." S. Rep. No. 357, 98th Cong., 2d Sess. 10 (1984) (emphasis added).

"Any meaningful formulation of neutrality will dictate that, when the state makes a facility available to *non*religious groups, it must give religious groups no less opportunity." Tribe, *supra*, at 1175-76 (emphasis in original). Therefore, Petitioners' policy of denying equal access to students who plan to engage in religious speech is not a neutral policy. It is a policy of official disapproval of, and discrimination against, private, religious speech and private

[9] Our argument is not based on any assertion that high school students are impressionable and thus would mistakenly perceive the challenged policy as expressing disapproval of religion. Rather, the position of *amici curiae* is that a reasonable observer, whether of high school age, college age, or an adult, would conclude that this discriminatory policy clearly conveys a message of state disapproval of religion.

religious speakers.[10] Thus, its primary effect is to inhibit religion in violation of the Establishment Clause.

III. PETITIONERS' POLICY OF CENSORING PRIVATE RELIGIOUS SPEECH OF STUDENTS VIOLATES THE FREE SPEECH AND FREE EXERCISE CLAUSES.

In *Widmar*, a public university denied a student religious group access to university meeting facilities that were otherwise generally available for use by student organizations. 454 U.S. at 264-65. Finding that the university had created "a forum generally open for use by student groups," *id.* at 267, this Court held that the school's exclusion of religious speech from that forum violated the Free Speech Clause of the First Amendment. *Id.* at 270-77. Significantly, this Court reaffirmed the principle that "religious worship and discussion" are forms of speech entitled to all the protections of the First Amendment. *Id.* at 269. Moreover, the Court also recognized that the Free Exercise Clause is offended by "content-based discrimination against . . . religious speech." *Id.* at 276. "Whether one starts with the principle that the free speech clause requires content-neutral regulation of speech, or with the principle that the religion clauses require strict neutrality toward religion, one arrives immediately at the result in *Widmar*." Laycock, *supra*, at 11.

In the present case, the Eighth Circuit found that "the facts in the case before us today are the same as the facts in *Widmar* except for the setting." *Mergens*, 867 F.2d at 1080. Since the Eighth Circuit concluded that students in public secondary schools were unlikely to confuse an equal access policy with state sponsorship of religion, it held that Petitioners' content-based exclusion of religious speech was unconstitutional under *Widmar*. *Id.* at 1080.

[10] This Court has made it clear that the "Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment).

A. Petitioners Created a Limited Public Forum for Student Group Meetings Before and After School and thus Cannot Censor Speech Within that Forum Based Upon its Content Unless a Compelling State Interest Clearly Exists.

By their policy and practice of providing facilities for use by student groups, Petitioners have created a forum generally open for use by student groups. *See Widmar*, 454 U.S. at 267; *see also Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983). Petitioners have allowed approximately thirty student groups to meet on campus, and, until Respondents attempted to form their Bible Study Club, no student group had ever been denied access to the school's forum. *Mergens*, 867 F.2d at 1077-78. Student groups allowed to meet by Petitioners include a Chess Club, two service clubs similar to Rotary International, and a scuba diving club. *Id.*[11] Thus, the present case before this Court is identical in all material respects to *Widmar* and, as such, Petitioners' content-based exclusion of Respondents' religious speech "violates the fundamental principle that a state regulation of speech should be content-neutral." *Widmar*, 454 U.S. at 277.

As in *Widmar*, the question here is not whether Respondents are entitled to favored treatment concerning the use of school facilities; rather, the issue is whether Petitioners, having opened school facilities for use by student groups, can now discriminatorily exclude Respondents because of the religious content of their speech. *Id.* at 273. In order to justify their content-based exclusion of religious student groups, Petitioners must clearly show that their policy "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 270. *See also Perry*, 460 U.S. at 45-46.

This Court has had occasion to review public high school fora on a number of occasions. For example, in *Tinker* the Court determined implicitly that a public high school campus is a limited public forum for student speech "during the authorized hours." 393 U.S. at 512-13. Under *Tinker*, a prior restraint on student speech is permissible only upon a "showing that the students'

[11] Other groups permitted to meet on campus include Future Business Leaders of America and the Photography Club. *See* Pretrial Order Stipulation #17.

activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

As previously discussed, the reasoning in *Widmar* applies with full and equal force to public high school fora. This Court recently reaffirmed that, under *Widmar*, public school facilities "may be deemed to be public forums" if school authorities have by policy or by practice opened those facilities for use "by some segment of the public, such as student organizations." *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562, 568 (1988). Thus, read together, *Tinker*, *Widmar* and *Hazelwood* stand for the principle that a content-based exclusion from a limited public forum for high school student groups violates the Free Speech Clause unless the policy is necessary to serve a compelling state interest and is narrowly drawn to achieve that purpose.[12]

Neither *Hazelwood* nor *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), is to the contrary. The critical distinction between the present case and those cases is between voluntary student-initiated speech in a limited public forum and school-sponsored speech in a restricted forum.

In *Fraser*, a student was suspended after delivering a speech nominating another for student elective office. The speech was delivered before a "captive audience" of students attending an assembly, which this Court found to be "part of a school-sponsored educational program in self-government." *Id.* at 677, 684. During the entire speech, the student referred to his candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677-78. The result was to create a substantial disruption of the school-sponsored student assembly. Some students hooted, yelled, and graphically simulated the sexual activities alluded to in the speech; other students were "bewildered and embarrassed by the speech." *Id.* at 678. Thus, the speech in *Fraser* resulted in a

[12] In *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), the four Justices of this Court who reached the merits of the case would have applied *Widmar* to a public secondary school. *Id.* at 552-53 (Burger, C.J., joined by White and Rehnquist, J.J., dissenting). *Id.* at 555-56 (Powell, J., dissenting); *see also* L. Tribe, *supra*, at 1177. In fact, Justice Powell in his dissent in *Bender* remarked: "I do not believe — particularly in this age of massive media information — that the few years difference in age between high school and college students justifies departing from *Widmar*." 475 U.S. at 556.

material and substantial disruption of the work and discipline of the school, and this Court accordingly held that the school district "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.* at 685.

The facts here are totally different from those in *Fraser*. Respondents wish to form a voluntary, student-initiated Bible Study Club for the purpose of engaging in private religious speech in a forum that is generally open to student organizations. There is no captive audience for Respondents' speech, the meetings will not be part of a school-sponsored assembly, and, significantly, their speech will not be lewd, sexually explicit, or disruptive of the work and discipline of the school. Therefore, Respondents' speech is protected under *Tinker* and *Widmar* and not subject to exclusion under *Fraser*.

In *Hazelwood* this Court again reviewed student speech on the high school campus. As such, this Court in *Hazelwood* reaffirmed the continuing validity of *Tinker* as applied to speech in which students express "their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours.'" 108 S.Ct. at 567 (quoting *Tinker*, 393 U.S. at 512-13). As previously discussed, *Hazelwood* also confirmed that public school officials can create, "by policy or by practice," limited public fora for use by student organizations. 108 S.Ct. at 568 (citing *Widmar* and *Perry*). Thus, *Hazelwood* does not depart from the established principles of *Tinker*, *Widmar* and *Perry* in the context of student-initiated speech in a public high school open forum.

Hazelwood concerns student speech in the context of a closed forum—a school-sponsored newspaper named "*Spectrum*." Pursuant to a written school board policy, *Spectrum* was published by the Journalism II class and therefore was "within the adopted curriculum" of the school. *Id.* Journalism II was taught by a faculty member during regular class hours and students received grades and academic credit for their participation in the course. *Id.* Not only was the newspaper designated an official part of the curriculum and a regular classroom activity, but it was the practice of

the Journalism II teacher, Mr. Stergos, to "exercise a great deal of control" over the publication. *Id.*[13] Thus, this Court held that the school-sponsored newspaper was not a limited public forum for its student reporters and editors, or for the student body generally. *Id.* at 569.

The restricted forum found by the Court in *Hazelwood* is based upon the specific written policies and established practices of the school and its officials in exercising great discretion and control over a school-sponsored newspaper. Thus, the question in *Hazelwood* was different from the question in *Tinker* and *Widmar*. The *Hazelwood* Court clearly recognized this distinction:

> The question whether the First Amendment requires a school ~~to tolerate~~ particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id. "Thus while *Tinker* requires secondary schools to accommodate the free speech rights of students, *Hazelwood* distinguishes personal from school-endorsed speech. If the students invoke the

[13] As the Court noted:

> [Mr. Stergos] selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company.

108 S. Ct. at 568. In addition, Stergos was "the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." *Id.* Moreover, after final review and editing by Stergos, each issue of *Spectrum* had to be reviewed and approved prior to publication by the principal of the school. *Id.*

school's endorsement, then the school may exercise reasonable regulatory constraints." Mangrum, *Extracurricular Religious Activities in the Public Schools: Constitutionally Permissible, Required or Proscribed?* 22 Creighton L.Rev. 955, 963 (1989).

Hazelwood establishes a three part test that must be satisfied by school officials who wish to exercise control over student expression in a restricted forum:

1. The school must have adopted and have in place a specific written policy defining, describing, and limiting the restricted forum in question;
2. The restricted forum must be part of the school curriculum, students must be supervised by faculty members, and the activity must be "designed to impart particular knowledge or skills to student participants and audiences"; and
3. As a matter of policy and practice, the school must exercise strict control over the forum, even to the extent of "story ideas" and the forum's "content."

108 S. Ct. at 568, 570. Petitioners have failed to satisfy the requirements of *Hazelwood*. Instead, they seek to exclude the private, personal speech of Respondents from an otherwise generally open forum for student organizations. This attempt to silence the personal expression of students taking part in voluntary, student-initiated organizations is inconsistent with the holdings in *Tinker* and *Widmar*.

At trial, Petitioners argued that each of the approximately thirty student clubs allowed to meet on campus is curriculum-related. For example, Dr. Findley, the principal of Westside High School, testified that the Chess Club related to the curriculum because "it fosters critical thinking and logic." *Mergens*, 867 F.2d at 1078. He also testified that Zonta and Interact, the service clubs related to Rotary International, "are related to the goals of sociology and psychology" and that the scuba diving club "relates to the goals of physical education." *Id.* at 1078. This feeble attempt to argue that the school maintains a closed forum is without merit. It is inconsistent with all of this Court's school forum cases, and, if

adopted, would make the Constitutional rights of public secondary school students completely dependent upon administrative decree. The Eighth Circuit refused to allow the school to "simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group." *Id.* at 1078. This attempt by Petitioners to circumvent the First Amendment by administrative decree, similar to the policy of the Board of Airport Commissioners struck down by this Court in *Board of Airport Commissioners v. Jews For Jesus, Inc.*, 107 S. Ct. 2568 (1987), is "substantially overbroad, and . . . not fairly subject to a limiting construction." *Id.* at 2573.[14]

B. Petitioners have not Justified their Censorship of Respondents' Speech by Showing that the Policy was Necessary to Serve a Compelling State Interest.

As previously discussed, in order to justify their content-based exclusion of religious student groups from the limited public forum Petitioners are required to demonstrate that their policy "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270. Any attempt by Petitioners to assert a compelling state interest based upon the Establishment Clause is completely without merit.[15] *See Widmar*, 454 U.S. at 270-275. As discussed, *supra*, the Establishment Clause does not require public secondary schools to exclude the private religious speech of students from campus. Respondents' religious speech is neither school-sponsored, nor is it likely to be perceived as being school-endorsed. *See* Moshman, *supra*, at 117. It is purely personal speech and, therefore, is protected under the Free Speech and Free Exercise Clauses and is not prohibited by the Establishment Clause.

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[14] In *Jews for Jesus*, this Court noted: "In essence, the result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related." 107 S. Ct. at 2573. The very same issue is implicated in the present case.

[15] The previous discussion of the Establishment Clause and its relation to the Equal Access Act applies equally to the issue being discussed in the text. *See supra* Arguments I and II.

Even assuming *arguendo* that Petitioners have a compelling interest in avoiding a mistaken perception of endorsement of religion, they have not narrowly tailored their policy to achieve that interest without unnecessarily burdening Respondents' rights under the Free Speech and Free Exercise Clauses. For example, Petitioners certainly could have eliminated any mistaken perception of endorsement by disclaimer and by explaining our society's commitment to free speech and religious tolerance to students through announcements and posted notices. Again, as the evidence illustrates, public high school students would have been able to understand these explanations, and, therefore, there was no need to adopt "the more restrictive alternative of abridging freedom of speech, freedom of association, and the free exercise of religion." Moshman, *supra*, at 118.

CONCLUSION

Perhaps one person's speech is another person's blasphemy. Nevertheless, in one of the Supreme Court's landmark religious speech cases, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court stated:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. [Bitter controversies may occur but] the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310. In short, "a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Id.* at 308.

It is crystal clear that Petitioners' exclusion of Respondents from the Westside High School public forum is inconsistent with our nation's commitment to free speech and religious freedom. Under both the Equal Access Act and the Constitution, religious student groups are protected against such content-based exclusion

from public secondary school fora open to other student organizations. The Equal Access Act is perfectly consistent with the Establishment Clause and this Court's prior decisions. Moreover, Petitioners' policy of censoring the private religious speech of students violates the Establishment, Free Speech, and Free Exercise Clauses. This discriminatory policy also is inconsistent with this Court's decisions in *Tinker* and *Widmar*.

For all the compelling reasons set forth above, the judgment of the Court of Appeals must be upheld.

Respectfully submitted,

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